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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 6.

INLAND WATERWAYS CORPORATION, ET AL., *Petitioners*,

v.

FREDERICK J. YOUNG, Receiver of Commercial National Bank of Washington, D. C., *Respondent*.

PETITION FOR REHEARING.

SWAGAR SHERLEY,
CHARLES F. WILSON,
H. B. WEAVER, JR.,
GEORGE B. SPRINGSTON,
Attorneys for Frederick J. Young, Receiver.

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PETITION FOR REHEARING.

Comes now Frederick J. Young, as Receiver of The Commercial National Bank of Washington, D. C., respondent in the above captioned cause, by his attorneys, and submits this, his petition for rehearing of the above cause, and in support thereof respectfully shows:

The doctrine now established by the decision of four justices, with three justices dissenting, which in effect holds that implied power has always existed in national banks to pledge their assets to secure all deposits of moneys of Federal agencies, is so sweeping in scope and so far-reaching in effect that it is earnestly felt by respondent that the interest of the general and unsecured depositors,

not only in the closed banks involved in this particular litigation, but in all national banks throughout the country, justifies the Court in affording an opportunity for this aspect of the matter to be examined anew and presented in a re-argument before these issues shall be finally settled.

I.

Nothing in the Financial Experiences of the Government Prior to the National Bank Act Warrants the Conclusion That National Banks Have a General Implied Power to Secure All Federal Funds Regardless of Character.

The conclusion of the Court, as we understand it, is predicated upon a historic background touching the losses which had been incurred by the Government prior to 1864 in connection with the deposit of public moneys in banking institutions. The Court's reasoning is that because of this experience, one of the chief objects of Congress in passing the National Bank Act was to create banks in which the deposit of public money would be secured by pledge of their assets and hence, Congress not having prohibited by express provision such banks from giving security for other funds, the Court, in construing the powers of the bank, having in mind this purpose, must hold that national banks have an inherent or implied power to secure repayment of all moneys in which the Government is interested, by pledging their assets.

It is respectfully submitted that the complete historic background, as well as that recited by the Court, does not warrant the Court's conclusion as to any such inherent or implied power in national banks.

While it is true that Congress unquestionably was cognizant, from the past history of the country, of the desirability of safeguarding public moneys, in enacting the National Bank Act, yet it is also true that Congress had in mind the accomplishment, not only of this end, but of others

of equal importance to the country, and in choosing ways to effectuate these ends, enacted a code of banking law complete in itself, in which the powers and duties of national banks were given and imposed in detail.

The experiences of the Government both with the first and second Bank of the United States, as well as with state banks of issue, not only as fiscal agents of the Government, but also as depositories of public moneys, as well as its experiences as to the evils frequently flowing from the retention of such moneys in the Treasury and Sub-Treasuries of the United States because of the withdrawal of such funds from the channels of commerce, were such as to make imperative the need of creating a nation-wide system of banks under a central Federal control whose powers and duties should be those and those only that in the judgment of Congress would ensure safe banks of issue, fiscal agents of the Government, available depositories of public money, and also banks of such soundness as to invite and justify their use by the people of the United States as financial institutions and which, in case of disaster, would assure private depositors equality of treatment. Particularly was it necessary to create a sound bank currency, and in connection therewith, to establish a medium for the marketing of Government securities and the re-establishment of Government credit then greatly impaired.

Bitter experience during the panic of 1837 and prior thereto had taught Congress that the securing of public money that might be placed on deposit with banks against ultimate loss was but one of the ends to be accomplished. Congress attempted, and with a large degree of success, the accomplishment of all of the above objectives. It recognized that *ultimate recovery of deposits* from failed banks was not so much to be sought as banks that, by being required to follow wise banking practice, would, in most circumstances, be self-sustaining financial institutions. Accordingly, not simply a law authorizing banks to be incorporated under a general Federal law with a general grant

of powers incident to a bank institution was enacted, but a detailed code, complete in itself, as this Court has declared, was enacted, express powers being given to meet every need as Congress saw the need. Congress did not leave important powers necessary to accomplish the ends indicated to be spelled out as ones necessarily implied.

In particular Congress did not leave the matter of securing public funds to be inferred from the general powers of a national bank. *The Act is not silent in that regard.* The securing of deposits of Government funds found desirable by the history of Government losses prior to 1864, was accomplished by the direct language used in Section 45, wherein Congress gave to the Secretary of the Treasury the right to secure such public funds *but, having a knowledge of good banking practice and of the undesirability of having assets of a bank frozen by being pledged to secure deposits*, it left to the Secretary of the Treasury's discretion the extent to which he should deposit any public money in national banks, what national banks should be designated as depositories of public money, the amount of public money which should be placed in any particular national bank, and the extent and character of the security that should be taken for such deposits as were made in national banks.

We submit that the only natural conclusion that can be drawn from the creation of the banking system is that Congress desired to create a system complete in itself, in which powers and duties were delicately balanced to achieve as fully as possible each desired result *without undue sacrifice of others.* To the extent that assets of a bank should be required to be pledged as security for deposits of public moneys, the liquidity of the banks' assets would be sacrificed and its soundness in time of stress imperiled. Hence it was that Congress placed in the Secretary of the Treasury a sole discretion as to when a bank should be designated a depository and the amount of public money to be placed with it, and the security to be exacted.

Congress did not undertake to provide how much of public funds should be placed with the banks or the allocation among banks in various sections of the country of the amounts so placed; the Government had had bitter experiences as a result of such policy. It proposed to safeguard the public moneys that should be deposited in the national banks, but looked to the Secretary of the Treasury so wisely to exercise his discretion as not to imperil any bank's safety, in order that the Government might in no event suffer a loss.

In 1864, when the National Bank Act was enacted, the express power found in Section 45, giving the Secretary of the Treasury the right to exact security for deposits of public money, was entirely adequate to take care of the securing of the Government's funds that the Secretary might cause to be deposited in national banks. The activities of the Government were more strictly confined, and Governmental commercial activities such as those now carried on by the Inland Waterways Corporation, the Merchant Fleet Corporation, and various other Governmental agencies were not considered. Consequently there was no need to give a general power to national banks to secure depsits of money of agencies of the Government.

Now it is said that because of the many activities of the Government, not considered at the time of the passage of the National Bank Act, and the assumed desirability of safeguarding Federal funds other than public moneys as such by pledging assets, the Court is warranted in reading into the Act implied powers as to the securing of such funds and this because of the losses that the Government had suffered touching *public moneys* when such funds had been deposited in state banking institutions without pledged security.

If Congress had felt, as the Court now suggests, that national banks should be permitted to pledge their assets to secure deposits of moneys of Federal agencies created in the great expansion of Governmental activities since 1864,

it could easily have enacted legislation accomplishing this end, as has been done from time to time in connection with the deposits of specified types of Federal funds.

It is manifest that the question of how far the Federal Government should be preferred over general depositors in the liquidation of an insolvent national bank is a delicate one and one which Congress, of necessity, has considered from time to time as to proposed legislation.

Shortly after the decision of this Court in *Texas & Pacific Ry.* v. *Pottorff*, (1934) 291 U. S. 245 and *Marion* v. *Succeden*, (1934) 291 U. S. 262, the Secretary of the Treasury sent identical letters to the President of the Senate and the Speaker of the House saying that these two decisions created "urgent necessity" for the prompt enactment of an amendment to Section 45 of the National Bank Act which should clearly enable national banks to pledge their assets to secure deposits of funds such as those involved in the instant case and a proposed amendment was attached to each of the said letters (Senate Document No. 175, 73rd Cong. 2d Sess., Appendix page 13). The Secretary's request was laid before both Houses of Congress (1934, 78th Cong. Rec. 7596, 7726), was printed as a Senate Document (No. 175, 73rd Cong. 2d Sess.) and presented to the Senate in session (1934, 78th Cong. Rec. 11466). The amendment was embodied in a bill (S.3558, 73rd Cong. 2d Sess.) which was referred to the banking committee (1934, 78th Cong. Rec. 8154), but the bill was never reported out.

Later in 1934, however, when the Senate was considering another banking bill (S. 3784) which contained nothing on the question of securing deposits, an amendment was proposed from the floor, the purpose of which was to extend somewhat the power of national banks to secure deposits of States and their sub-divisions (78 Cong. Rec. 12058).

In discussing this proposed amendment, the Senator in charge of the banking bill said that the Senate Committee on Banking and Currency was opposed to the general prin-

ciple of National Banks securing deposits of public funds." (78th Cong. Rec. 12058). The entire banking bill failed to pass.

The policy of Congress to protect the deposits of private citizens is also shown in the Banking Act of 1935, which, in amending the provision previously made for the creation of the Federal Deposit Insurance Corporation, not only appropriated a large sum of public money for non-dividend paying stock of the Corporation, but also directed that a greater sum be advanced whenever needed to meet the Corporation's insurance obligations. Sec. 101 of the Act of Aug. 23, 1935, 49 Stat. 686, 699, amending Sec. 1(10) of the act of June 16, 1934, 48 Stat. 161, 177 (U. S. C. title 12, sec. 264 (d) (o)). (See title 15, Sec. 606(a)).

It cannot be assumed that the desirability of safeguarding all Federal funds is so great that the Court is warranted in departing from its often expressed declaration

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*"Mr. President, the subject matter covered by the amendment offered by the Senator from Illinois was considered by the Committee on Banking and Currency, and the committee refused to take any action on it, on the ground that *the committee is opposed to the general principle of public deposits having any security and to giving them a preference over the deposits of the ordinary depositor.* Therefore the committee has been unwilling to take any action along this line.

However, it is recognized that there is a practical situation to be met if the national banks are required to compete with State banks, and in many States there are laws permitting securities to be given for public deposits. If national banks are not permitted to meet that competition, and if nothing is done to require State banks to submit to the same inhibition under which national banks labor, the national banks will be at a disadvantage which might well be called an unfair disadvantage.

Furthermore, the Comptroller of the Currency is already under some embarrassment on account of security having been given for public deposits, and it already having been sold in satisfaction of debts, and many of those transactions would have to be unwound if the amendment of the Senator from Illinois were not agreed to.

Therefore, *still protesting against the principle of having any security given at all for public deposits*, I do not think we ought to resist the adoption of the amendment just offered." (Italics added)

that the powers of national banks are such, and such only, as are affirmatively granted. Such a conclusion, we submit, disregards the need and desirability of sound banking practices and, in the interest of safeguarding such funds, sacrifices liquidity of assets and good banking practice, the observance of which *assures solvent banks*. It assumes that had Congress anticipated present activities of the Government and its proprietary interest in the agencies created for carrying out such activities, it would have made provision for the safeguarding of the funds of such agencies by authorizing a pledge of assets. Since Congress did not, it is assumed that its failure to prohibit the securing of such funds by pledge of assets of national banks leaves this Court free to imply powers not granted. With the utmost respect, we submit that this is not to interpret but to make law.

II.

The Legislative Policy of Congress in Refusing to Grant to National Banks a General Power to Secure All Governmental Deposits and Limiting Such Power to Governmental Deposits Provided for by Specific Legislation Has Been Consistently Recognized by This Court in Its Previous Unanimous Decisions.

In its opinion in the instant case this Court recognizes the soundness of the principles announced in its earlier opinions in *Texas & Pacific Ry.* v. *Pottorff*, (1934) 291 U. S. 245, and *Marion* v. *Sneeden*, (1934) 291 U. S. 262, and states:

> "In view of the thorough consideration which these two cases received and the added weight which they derive from the authority in the field of banking of Mr. Justice Brandeis, the writer of the opinions, *we start with full acceptance of what they decided.*" (Italics added.)

We submit that one of the basic principles followed by this Court in the earlier cases is clearly set forth by Mr.

Justice Brandeis in the *Pottorff case* where, at page 253, it is stated:

> "National banks lack power to pledge their assets to secure a private deposit. The measure of their powers is the statutory grant; and powers not conferred by Congress are denied. For the Act under which national banks are organized constitutes a complete system for their government, *Cook County Bank* v. *United States*, 107 U. S. 445, 448; *California Bank* v. *Kennedy*, 167 U. S. 362, 366; *First National Bank* v. *Missouri*, 263 U. S. 640."

After a brief discussion of the *Pottorff* and *Sneeden cases* the opinion in the instant case states:

> "But the function of national banks as depositaries of Federal funds was not before the Court in the Pottorff and Sneeden cases, and the power of the banks in relation to such funds could not have been decided there. That power is the exact issue here. *The solution of this problem, however, must be found by the application of those standards for judgment which were decisive in the former cases.* In other words, the history and purposes of the statute and the traditional policy of the National Government in utilizing the national banks as fiscal agencies must give meaning *to the silence of the Act.*" (Italics added).

From the above extract from its opinion it will be observed that the Court, while at the outset stating that the standards which it laid down in the *Pottorff* and *Sneeden cases* are controlling in arriving at the solution of the question presented in the instant case, approaches the solution of the issue here presented by adopting the view that, because the National Bank Act is *silent* as to the existence of a power of national banks to pledge assets to secure Federal funds generally it is the duty of the Court to consider the history and purposes of the statute and the traditional policy of the Government in utilizing national

banks as fiscal agencies. The Court points to no ambiguity in the statute in connection with the existence of this power but starts with the premise above quoted that, the Act being silent, the existence of the power may be found in the history of the Act and in the traditional policy of the Government.

We submit that the extract from the *Pottorff* decision above quoted leaves no doubt that if, as this Court states in the instant case, the statutory grant is silent as to the existence of a general power to secure deposits of all Federal funds, *the power is denied.* This clearly appears to be the principle of statutory construction followed by this Court in the *Pottorff* and *Sneeden cases* where the silence of the Act as to the existence of the power there sought to be created by implication was considered as a denial by Congress of the power.

Nor, in our opinion, is this Court's construction of Section 45 of the National Bank Act and the subsequent Acts of Congress in accord with the construction previously placed on these acts by this Court in the *Pottorff* and *Sneeden cases.* In the instant case, the Court construes the statutes as a recognition of an existing power of national banks to make the pledge, whereas in the earlier decisions the Acts were construed not as recognition of an existing power, *but as creating a power* that did not otherwise exist.

In the *Sneeden case, supra,* at page 268, this Court stated:

> "We are of opinion that the Act of 1864 did not confer the power to pledge assets to secure any public deposits except those made under Sec. 45 by the Secretary of the Treasury of the United States. The power conferred by each later act, except that of 1930, was limited to securing specific federal funds."

The funds here in question are not within the scope of Section 45 of the National Bank Act and there is no act of Congress specifically requiring these petitioners to exact security or authorizing the bank to furnish such security.

In *Lewis* v. *Fidelity & Deposit Company*, 292 U. S. 559, this Court said:

> "In Texas & Pacific Ry v. Pottorff, 291 U. S. 245, and Marion v. Sneeden, 291 U. S. 262, decided after the entry of judgment below, we held that a national bank had, prior to the Act of June 25, 1930, no power to make any pledge to secure deposits except the federal deposits specifically provided for by Acts of Congress."

We submit that the above quotation is an accurate statement of what this Court decided in the *Pottorff* and *Sneeden cases* and shows that the fundamental question decided in those cases was *the power* of national banks to pledge their assets to secure deposits. A reading of the opinions in those two cases does not, in our judgment, indicate that they were predicated simply upon the character of the deposits there secured but on the contrary, that the basic and fundamental consideration was *the power* of national banks under the National Bank Act to secure *any* deposit.

Respondent respectfully submits that if this Court, as stated in the opinion in the instant case, adheres to the principles announced by a unanimous Court in the *Pottorff* and *Sneeden cases*, it must conclude that the pledges here made were illegal, since Congress did not authorize the pledges and in the absence of such authorization, the power is denied. Where the power is wholly lacking, the issue is not then in doubt, hence custom and usage, no matter how long continued, cannot vitalize void transactions. This Court so held in the *Sneeden case**, recognizing the admitted knowledge and acquiescence of the Comptroller of the Currency in the making of the pledge there involved, and rejecting the position advanced, that the Comptroller's

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* "- - -comptrollers of the currency knew that this was being done; and they assumed that the banks had power so to do. But the assumption was erroneous." *Marion* v. *Sneeden*, 291 U. S. 262, 269.

acquiescence could lend legality to an illegal and unauthorized act. At this point in the opinion in the *Sneeden case*, the Court observed also, that any implied power of national banks to pledge their assets would be contrary to sound banking.

The obvious importance of the issues presented in this case would seem to justify the granting of this petition and re-consideration by this Court.

Respectfully submitted,

SWAGAR SHERLEY,
CHARLES F. WILSON,
H. B. WEAVER, JR.,
GEORGE B. SPRINGSTON,
Attorneys for Frederick J. Young, Receiver.

I hereby certify that this application is presented in good faith and not for delay.

SWAGAR SHERLEY,
Counsel.

APPENDIX.

73D CONGRESS, 2d Session | SENATE | DOCUMENT No. 175

Security of National Banks for Deposits of Public Moneys

Letter From

THE SECRETARY OF THE TREASURY

Transmitting

A Draft of a Bill to Amend Section 5153 of the Revised Statutes, Designed to Clarify the Situation With Respect to the Giving of Security by National Banks for Deposits of Public Moneys

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April 26 (calendar day, April 28), 1934.—Referred to the Committee on Banking and Currency and ordered to be printed

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APRIL 27, 1934.

MY DEAR MR. PRESIDENT: I have the honor to forward herewith a draft of a bill to amend section 5153 of the Revised Statutes, designed to clarify the situation with respect to the giving of security by national banks for deposits of public moneys.

This matter has been the subject of an exhaustive study, and the enactment of the proposed legislation is recommended by the Comptroller of the Currency. I am forwarding herewith a copy of excerpts from a memorandum forwarded to me by him.

If you deem it advisable, it will be appreciated if these proposals can be submitted for consideration through the appropriate channels.

Respectfully yours,

H. MORGENTHAU, JR.,
Secretary of the Treasury.

HON. JOHN N. GARNER,
President United States Senate.

Attached hereto is text of proposed amendment to section 5153 of the Revised Statutes, as amended (U. S. C., title 12, sec. 90), which amendment relates to the designation of depositaries of public money by the Secretary of the Treasury and the giving of security by national banking associations for deposits of public money of the United States and for various other types of deposits made by public officials, consisting of money for which they are accountable under the law by virtue of their official capacity. The essential respects in which this amendment changes the present law is in that it eliminates doubt under recent decisions as to the power of national banks to give security for the protection of deposits of public money belonging to various Government agencies or of money deposited thereby where they are accountable for such money by reason of the official capacity in which held.

The amendment operates with similar effect as to deposits by officers, agents, or employees of the States, Territories, or insular possessions or any public instrumentality or agency thereof, where the depositing official is charged with the custody of and is accountable for such money by virtue of his official position. Provision is made that security heretofore given for the various types of deposits referred to shall be deemed validly given except where heretofore determined to be in violation of the act of June 25, 1930.

There is urgent necessity for the prompt enactment of this legislation, due to recent decisions of the Supreme Court of the United States, particularly two decisions rendered February 5, 1934, in *City of Marion, Illinois*, v. *Sneeden, Receiver*, and *Texas and Pacific Railway Company* v. *Pottorff, Receiver*, in which the Court took the position that national banks have no implied power to give security for deposits of public money, notwithstanding the fact that for more than 60 years national banks have been giving such security with the approval of the Comptroller of the Currency, in conformance to the views expressed by the Attorney General of the United States (in 30 Ops. Atty. Gen. 341), to the effect that the section being amended "is more reasonably construed as a recognition of the existence of the power on the part of national banks to give security for deposits than as a grant by implication or authority to give security for Government deposits alone." A large number of national banks have been placed in the

hands of receivers in the past 3 years. Almost all of these banks held deposits of public money for which security had been pledged. Millions of dollars in such deposits belonging to the Philippine Islands, the United States Shipping Board, Emergency Fleet Corporation, United States Housing Corporation, and similar entities were on deposit in these banks under a contract, whereby the bank had pledged collateral security therefor. These pledges were considered valid by this office and these agencies permitted to avoid loss of such deposits through realization upon the collateral held. Unless curative legislation is enacted to cover this situation, it may be the duty of this office as a matter of law to require these various agencies to restore these funds to the receivers of the various banks in which they were on deposit. Creditors of some of the banks are insisting upon such action being taken at this time. If such restoration must be made, then in most cases a substantial loss will be suffered by the depositing unit, which loss will in many instances ultimately fall upon the Treasury. The situation is also urgent from the standpoint of the going national bank, inasmuch as the various depositing units are now on notice as to the possible lack of power in the banks to give security for their deposits, with the result that these banks are threatened with the withdrawal of hundreds of millions of dollars, which no doubt will be deposited in State banks which do under the State law possess power to give collateral security therefor.

The same situation exists with respect to deposits of funds by the States and their various agencies. Generally speaking, there has been a preference given national banks by the depositing officials thereof. The State treasurer of Illinois within the past 10 days has indicated he feels that he must withdraw approximately $54,000,000 from national banks in Illinois, $26,000,000 of which is in two Chicago banks. The legal representatives of various drainage and irrigation districts in California have indicated that unless the law is clarified, they must withdraw some $50,000,000 from national banks in California. When one considers the total amount of such deposits in national banks all over the United States which may thus be suddenly withdrawn, and the consequent forced liquidation of assets which may be required of such banks in order to meet such withdrawals with resulting ill effect upon market conditions, it becomes imperative to avoid such result by having appro-

priate legislation promptly enacted eliminating the difficulty.

I accordingly recommend that appropriate action be taken to have this amendment enacted into law.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 5153 of the Revised Statutes, as amended (U. S. C., title 12, sec. 90; U. S. C., supp. VII, title 12, sec. 90), is amended to read as follows:

"SEC. 5153 (a). All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safe keeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government: *Provided*, That the Secretary shall, on or before the 1st of January of each year, make a public statement of the securities required during that year for such deposits. And every association so designated as receiver or depositary of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the Government for internal revenue, or for loans or stocks: *Provided*, That the Secretary of the Treasury shall distribute the deposits herein provided for, as far as practicable, equitably between the different States and sections. Notwithstanding the extent, if any, to which the same may not heretofore have been applicable thereto, the provisions of this paragraph, of section 3621 of the Revised Statutes, as amended (U. S. C., title 31, sec. 495), and of the thirteenth paragraph of section 9 of the Federal Reserve Act, as amended (U. S. C., supp., VII, title 12, sec. 332), shall apply to any and all money held by any instrumentality or agency of the United States, or by any officer, employee, or agent of the United States, or of any such instrumentality or agency, in his official capacity, and shall, to the extent designated by the Secretary of the Treasury, apply to any money held by any corporation in which, or in the funds of which, the United States has an interest, or by any officer, employee, or agent of any such corporation, in his official capacity. Nothing in this paragraph shall be construed to affect any powers conferred by section 17 of the Act of March 3, 1911 (U. S. C., title 25, sec. 156), section 28 of the Act of May 25, 1918 (U. S. C., title 25, sec. 162), section 1 of the Act of August 24, 1912, as amended (U. S. C., title 39, sec. 759), section 61 of the Act of July 1, 1898, as amended (U. S. C., title 11, sec. 101), section 3 of the Act of March 3, 1933 (U. S. C., supp. VII, title 11, sec. 101a), and section 5234 of the Revised Statutes, as amended (U. S. C., title 12, sec. 192).

"(b) Any association, upon the deposit with it of any money by any State, or by any political subdivision of any State, or by any officer, employee, or agent of any such State or subdivision, in his official capacity, may give security for the safe keeping and prompt payment of the money so deposited; and, upon such deposit by any public instrumentality or agency of one or more States, or of one or more political subdivisions of any State, or by any officer, employee, or agent of any such instrumentality or agency, in his official capacity, may, with the consent of the Comptroller of the Currency, give such security; but no security shall be given under this paragraph, with respect to any deposit if under the statute law of the State in which such association is located, the giving of security for such deposit by other

banking institutions, in such State is prohibited. As used in this paragraph the term "State" means any State, territory, District, or possession (including the Philippine Islands) of the United States.

"(c) All security for any deposits described in this section heretofore given by any association shall be deemed to have been validly given except where the enforcement of such security has been denied by the Comptroller of the Currency as in violation of the second paragraph of this section (U. S. C., supp. VII, title 12, sec. 90), as in force after June 25, 1930, and prior to the enactment of this paragraph, and no such security, enforcement of which was so denied, shall be deemed to have been validly given."

SUPREME COURT OF THE UNITED STATES.

No. 6.—October Term, 1939.

Inland Waterways Corporation, United States Shipping Board Merchant Fleet Corporation, Harry H. Woodring, Secretary of War, and H. A. A. Smith, General Purchasing Officer and Chief of Washington Office of Panama Canal, Petitioners,

vs.

Frederick J. Young, Receiver of Commercial National Bank, of Washington, D. C.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[March 25, 1940.]

Mr. Justice Frankfurter delivered the opinion of the Court.

The question before us is whether a national bank may pledge assets to secure deposits of funds made by governmental agencies, even though they may not be "public money" within the scope of § 45 of the National Banking Act, 13 Stat. 99, 113 (12 U. S. C. § 90).

The deposits in question were made with the Commercial National Bank by three separate governmental agencies—by the Inland Waterways Corporation and the United States Shipping Board Merchant Fleet Corporation,[1] and by the Secretary of War on behalf of the Panama Canal Zone. After the bank's insolvency the present suit was instituted by the receiver, respondent here, for the recovery of the pledged assets or their proceeds to the extent of the amount in excess of the dividends paid to the general depositors. The District Court granted respondent's motion to strike out portions of the petitioners' answers asserting the validity of the pledges. The petitioners stood their ground, and decrees *pro confesso* for the respondent followed. The Court of Appeals for the District of

[1] Both these corporations are wholly owned by the United States.

Columbia affirmed, 100 F. (2d) 678, and we granted certiorari, 307 U. S. —, because the controversy raised matters of importance in the administration of the National Banking Act.

At the threshhold we are met by two recent decisions of this Court, *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, and *Marion* v. *Sneeden*, 291 U. S. 262. In view of the thorough consideration which these two cases received and the added weight which they derive from the authority, in the field of banking, of Mr. Justice Brandeis, the writer of the opinions, we start with full acceptance of what they decided.

The *Pottorff* case held that a national bank was without authority to pledge its assets as security for private deposits. In the absence of specific authority to make such pledges, the general policy of the Act and principles of sound banking practice were drawn upon to establish the prohibition. To allow the withdrawal of assets of the bank from general availability would impair the bank's liquidity—its ability to meet unexpected demands by depositors—and thereby restrict the national banking system as a reliable instrument of national finance. In the *Sneeden* case the banking standards relied upon in the *Pottorff* case were applied likewise to deny to national banks power to pledge their assets as security for deposits by state and local governmental agencies except where permission is given by the Act of June 25, 1930, 46 Stat. 809 (12 U. S. C. § 90).[2]

But the function of national banks as depositaries of federal funds was not before the Court in the *Pottorff* and *Sneeden* cases, and the power of the banks in relation to such funds could not have been decided there. That power is the exact issue here. The solution of this problem, however, must be found by application of those standards for judgment which were decisive in the former cases. In other words, the history and purposes of the statute and the traditional policy of the National Government in utilizing the national banks as fiscal agencies must give meaning to the silence of the Act.

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[2] Lewis v. Fidelity Co., 292 U. S. 559, involved merely the application of the Sneeden doctrine to the special circumstances presented by Georgia legislation in the case of national banks situated in that State. The Lewis case, like the Pottorff and Sneeden cases, did not bring into issue the power of national banks with reference to federal deposits. Of course, the Lewis case neither professed to enlarge, nor could it, the scope of the Pottorff and Sneeden decisions.

Congress has necessarily been concerned from the beginning to provide appropriate safeguards for government funds. One of the motives in the establishment of the first Bank of the United States was its availability as a safe depositary for such funds. They were kept there until the expiration of that Bank's charter in 1811. Thereafter and until the second Bank of the United States was chartered, government monies were kept in state banks. These deposits were without security, and as a consequence severe losses followed the financial dislocation which came with the War of 1812. This experience led the Government to exact security, and losses became negligible. Phillips, Methods of Keeping the Public Monies of the United States, pp. 6-20; H. Rep. No. 358, 21 Cong., 1st Sess., Vol. 3, p. 12; IV McMaster, History of the People of the United States, p. 295 *et seq.*; III American State Papers, Finance, p. 11. The second Bank of the United States, established partly to serve as a Government depositary, kept most of the federal funds until their withdrawal in 1833 by Secretary Taney. But as a condition to their deposit in various state banks after 1833, Taney, acting upon the earlier experience of the Treasury under Secretaries Gallatin and Crawford, exacted appropriate security.[3] By the Act of June 23, 1836, 5 Stat. 52, Congress translated Treasury practice into legislative policy. It thereby became the Secretary's duty, whenever wisdom dictated, to require collateral for Government funds. As a result security was demanded of almost all the depositaries. Phillips, *op cit.*, p. 63. The panic of 1837 brought another modification. Government monies were held by the local collectors and by the Treasury itself, and a little later deposited in the new Sub-Treasury. But in 1841 the old method of deposit in state banks was resumed under the practice which had been introduced in 1833. Exec. Doc. No. 123, 27th Cong., 2nd Sess., p. 2; Phillips, *op cit.*, p. 113. This arrangement—that is, deposits secured by collateral—continued until the Sub-Treasury Act of 1846, 9 Stat. 59, led to the withdrawal of Government funds from private banks. The sub-treasury system persisted until the establishment of the modern national banking system.

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[3] These conditions, incorporated in contracts between the Treasury and the banks, required collateral to be pledged for all deposits in excess of one-half the bank's paid-in capital. In addition the Treasury reserved the right to demand additional security whenever it was thought prudent. Exec. Doc. No. 2, 23rd Cong., 1st Sess., Vol. 1, p. 36; Phillips, *op cit.*, pp. 53-55; Girard, The Independent Treasury, p. 17.

The policy of securing Government deposits thus antedates the National Banking Act. It was the practical response to disastrous experience. It began without any statutory authorization, and was continued both with and without specific Congressional sanction. Long practice and Congressional approval lodged in the Secretary of the Treasury authority to take appropriate measures to safeguard the nation against loss of its funds. The integrity of Government monies was naturally considered an object of great national importance, the attainment of which properly belonged to those entrusted with their disposition.

It is against this background that the National Banking Act of 1864 must be projected, intended as it was to provide facilities for the deposit of Government funds. Congress was alive to the Treasury's experience with deposits, secured and unsecured, during the preceding decades, together with the policy which had evolved from that experience. Cong. Globe, 37th Cong., 3rd Sess., Pt. I, pp. 843-45. The banking system which Congress thus established embodied a blend of governmental and private purposes. See *Mercantile Bank* v. *New York*, 121 U. S. 138, 154; Davis, The Origin of the National Banking System, S. Doc. No. 582, 61st Cong., 2nd Sess.

By § 45 of the Act, Congress specifically commanded the Secretary of the Treasury to exact security for "public monies" deposited by him in national banks. R. S. § 5153 (12 U. S. C. § 90). We read this as an exaction of duty from the Secretary as to monies subject to his control, see *Cook County Nat. Bank* v. *United States*, 107 U. S. 445, 449, and not as a limitation upon the power of the bank to give security when it may be required by other Government officers and agencies charged with the custody of federal funds. Placing § 45 in the setting of its history, we do not think it should be read in a niggardly spirit, as though it expressed a gingerly departure from public policy. On the contrary, it is a manifestation of historic national practice, which is to be given scope consonant with the reason for its development. Compare *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381. By a series of specific statutory commands, Congress has recognized the power of national banks to give security for deposits of a governmental nature by laying upon various agencies, charged with the custody of such funds, a duty to exact collateral. See § 61 of the Bank-

ruptcy Act, 30 Stat. 562; § 9 of the Postal Savings Act, 36 Stat. 816; and Acts relating to Insolvent Bank Funds, 39 Stat. 121; Porto Rican Funds, 39 Stat. 951; Government Obligations, 40 Stat. 291 and Indian Monies, 40 Stat. 591. With one exception all these special statutory requirements pertain to funds held by the Government for the benefit of others. It is difficult to suppose that what Congress has commanded with respect to funds held by its agencies in an immediate fiduciary capacity, it would deem a violation of law if done with respect to funds beneficially owned by the United States itself. What may be inimical to the private aspects of the national banking system, and therefore *ultra vires*, has no such relevance to the public aspect of national banks, and to the enforcement of the public interest by those charged with primary responsibility for its guardianship.

So far as the powers of a national bank to pledge its assets are concerned, the form which Government takes—whether it appears as the Secretary of the Treasury, the Secretary of War, or the Inland Waterways Corporation—is wholly immaterial. The motives which lead Government to clothe its activities in corporate form are entirely unrelated to the problem of safeguarding governmental deposits, and therefore irrelevant to the issue of *ultra vires*. Compare *Skinner & Eddy Corp.* v. *McCarl*, 275 U. S. 1, 8.[4] The true nature of these modern devices for carrying out governmental functions is recognized in other legal relations when realities become decisive. Compare *Clallam County* v. *United States*, 263 U. S. 341; *Emer. Fleet Corp.* v. *West. Union*, 275 U. S. 415. The funds of these corporations are, for all practical purposes, Government funds; the losses, if losses there be, are the Government's losses. Compare *U. S. Grain Corp.* v. *Phillips*, 261 U. S. 106, 113. See Seventeenth Annual Report, U. S. Shipping Board, 1933, pp. 88-89, for summary of losses borne by Treasury on behalf of the Merchant Fleet Corporation, and compare Annual Report, Inland Waterways Corporation, 1936, pp. 16-22.

The policy underlying Congressional legislation and reflected in the history of governmental deposits is confirmed by the explicit recognition of that official in whom is centered oversight of the ad-

[4] See McDairmid, Government Corporations and Federal Funds, 31 Am. Pol. Science Rev. 1095; Federal Corporations and Corporate Agencies, 16 Harv. Bus. Rev. 436. The corporations, of course, perform "governmental" functions. Graves v. O'Keefe, 306 U. S. 466.

ministration of the National Banking Act. S. Doc. 175, 73rd Cong., 2nd Sess. The Comptroller of the Currency, to be sure, must himself move within the orbit of the National Banking Act. Illegality cannot attain legitimacy through practice. But when legality itself is in dispute—when Congress has spoken at best with ambiguous silence—a long continued practice pursued with the knowledge of the Comptroller of the Currency is more persuasive than considerations of abstract conflict between such a practice and purposes attributed to Congress. More than half a dozen agencies have thought it their duty to safeguard deposits in nearly a hundred banks by transactions similar to those before us. This practice had the approval of the Comptroller because he believed it within the scope of the National Banking Act. Even constitutional power, when the text is doubtful, may be established by usage. See *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 473. When dealing with such necessarily argumentative concepts as those of which the law of *ultra vires* is so largely composed, the responsible and pervasive practice of public officers bent on safeguarding the public interests ought to carry the day even were the issue more in doubt than we believe it to be.

Deeming the challenged pledges to have been validly made, we think petitioners were entitled to judgment. It is therefore unnecessary for us to consider the other arguments here urged in their behalf. The judgments below should be

Reversed.

Mr. Justice REED and Mr. Justice MURPHY took no part in the disposition of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 6.—October Term, 1939.

Inland Waterways Corporation, et al., Petitioners, vs. Frederick J. Young, Receiver of Commercial National Bank of Washington, D. C.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[March 25, 1940.]

Mr. Justice Roberts,

The court below followed and applied the decisions of this court in *Texas & Pacific Railway* v. *Pottorff*, 291 U. S. 245, *Marion* v. *Sneeden*, 291 U. S. 262, and *Lewis* v. *Fidelity & Deposit Co.*, 292 U. S. 559.

It is true that those cases presented the question whether national banks are authorized to give security for private deposits and those of state agencies. But the basis of each of the decisions was that national banks are without power to pledge assets as security for *any* deposits, in the absence of express legislative sanction. Paradoxically, the opinion of the court, while recognizing the authority, in the field of banking, of Mr. Justice Brandeis, who announced the opinions in all three cases for a unanimous court, rejects the fundamental principle of the opinions. Whereas in the *Lewis* case Mr. Justice Brandeis announced in plain terms that, in the absence of express authorization, a national bank has "no power to make any pledge to secure deposits except the federal deposits specifically provided for by Acts of Congress", the opinion of the court spells out such power despite "the silence of the act."

In the *Texas & Pacific* and *Marion* cases the opinions point out that whenever Congress has intended that security should be taken for deposits of government funds specific authority has been granted.[1] That what was thus said by Mr. Justice Brandeis was deemed necessary to the decisions and was the deliberate conclusion

[1] See Texas & Pacific Ry. Co. v. Pottorff, p. 257, Note 11; Marion v. Sneeden, p. 268.

of the court is evidenced by his statement in *Lewis* v. *Fidelity Co.*, at p. 564:

"In *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245, and *Marion* v. *Sneeden*, 291 U. S. 262, . . . we held that a national bank had, prior to the Act of June 25, 1930, no power to make any pledge to secure deposits except the federal deposits specifically provided for by Acts of Congress."

Now it is said that these cases incorrectly state the governing principle. That principle is now said to be that Congress cannot have intended to limit the authority of banks to give security in cases where administrative officers in charge of government funds have deemed it appropriate that security should be given. In other words, despite the withholding of any grant of power to institutions whose powers are only those granted,[2] a power is spelled out.

The attempt to buttress the implication of the power from the fact that federal agencies have heretofore exacted security, and that the Comptroller of the Currency has been of the view that such pledges were not in violation of the Act, is answered by what was said in *Marion* v. *Sneeden* (p. 269):

"comptrollers of the currency knew that this was being done; and they assumed that the banks had power so to do. But the assumption was erroneous."

I think that as the Court of Appeals followed the principle rightly applied in the decisions of this court its judgment should be affirmed.

The CHIEF JUSTICE and MR. JUSTICE MCREYNOLDS join in this opinion.

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2 "The measure of their powers is the statutory grant; and powers not conferred by Congress are denied." Texas & Pacific Ry. v. Pottorff, p. 253.